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No.

In the Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Ohio Supreme Court

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QUESTION PRESENTED

Whether petitioners, who are, respectively, an Ohio beneficiary claimant of trust property, and the Ohio trustee holding and administering such property, were denied due process of law by a judgment of the Ohio Supreme Court giving preclusive effect, as a matter of full faith and credit, to an order of a California court awarding the property and directing its distribution to another claimant, in a proceeding in which petitioners did not appear, and in which jurisdiction over them was asserted by mere notice of such proceeding?

LIST OF PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The parties to this proceeding in the Supreme Court of Ohio were:

The Toledo Trust Company,[1]
as Trustee of Trust No. 4117, *Petitioner*

The Toledo Trust Company,[1]
as Trustee of Trust No. 4118, *Petitioner*

Santa Barbara Foundation, *Respondent*

The Honorable Anthony J. Celebrezze, Jr.
Attorney General for the State of Ohio[2]

Alcoholics Anonymous, Central Office
Santa Barbara, California[3]

Nancy S. Jones[4]

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1. The Toledo Trust Company is a wholly owned subsidiary of Trustcorp, Inc., an Ohio corporation. Other Trustcorp, Inc. subsidiaries, all wholly owned, are Trustcorp Company, N.A., St. Joseph Bancorporation, Inc., First Bancshares of Huntington, Inc., SeaGate Capital Management Company, SeaGate Community Development Corporation, SeaGate Corporation, SeaGate Venture Management, Inc., and Trustcorp of Florida, N.A.

2. The Honorable Anthony J. Celebrezze, Jr., Attorney General for the State of Ohio was made a party pursuant to Ohio Revised Code §109.25, under which said Attorney General is a necessary party to all judicial proceedings involving the application of the doctrine of *cy pres*. The Attorney General has not participated on the merits below.

3. Alcoholics Anonymous has not participated below.

4. Nancy S. Jones, settlor of Trust No. 4117 the distribution of the assets of which is the subject of this litigation, is represented by counsel for The Toledo Trust Company, as Trustee of Trust No. 4118, and has elected to assert no claim of entitlement to distribution of the fund.

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Petitioners, The Toledo Trust Company, as Trustee of Trust No. 4118 and The Toledo Trust Company, as Trustee of Trust No. 4117, respectfully request that a Writ of Certiorari issue to review the judgment and decision of the Ohio Supreme Court entered on August 26, 1987.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 32 Ohio St. 3d 141, 512 N.E.2d 664. The Lucas County Court of Appeals Decision and Journal Entry of May 9, 1986 is unreported and is reproduced in the Appendix at A13 through A21. The Lucas County Court of Appeals Decision and Journal Entry of May 21, 1986 is unreported

and is reproduced in the Appendix at A22. The Lucas County Court of Common Pleas Opinion and Judgment Entry of July 29, 1985 is unreported and is reproduced in the Appendix at A24 through A29. The Lucas County Court of Common Pleas Order of November 19, 1987 is unreported and is reproduced in the Appendix at A30.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on August 26, 1987. A timely motion for rehearing was denied on October 7, 1987. A34. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the application of the following constitutional provisions and statutes:

1. U.S. Constitution, Article IV, Section 1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

2. U.S. Constitution, Fourteenth Amendment provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. §1738 provides, in pertinent part:

> . . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. California Probate Code §1200.5 appears in the Appendix at A106.

HOW FEDERAL QUESTION WAS RAISED AND PASSED UPON BELOW

1. In their memoranda in support of their respective Motions for Summary Judgment in the trial court, Petitioner The Toledo Trust Company, as Trustee of Trust No. 4118 and Respondent Santa Barbara Foundation urged acceptance of their diverging views as to whether the Ohio court was required, under Article IV, Section 1 of the U.S. Constitution and 28 U.S.C. §1738, to give preclusive effect to the California Probate Court's order determining entitlement of the trust assets, or whether the California judgment was not so entitled because that Court lacked personal jurisdiction as required under the due process clause of the Fourteenth Amendment to the U.S. Consti-

tution. The trial court held that Trust No. 4118 was entitled to the funds on state property law grounds, a threshold issue by its characterization, and the federal constitutional issues were not passed upon by it. A28.

2. The claimants again asserted their respective positions as to the constitutional issues in the Lucas County Court of Appeals, and again the Court of Appeals decided the case on a state property law ground, the federal constitutional issues again not being reached. A16.

3. The claimants in the Ohio Supreme Court again renewed their constitutional claims with respect to whether full faith and credit need be accorded the California decision. The Ohio Supreme Court decided the constitutional issue as follows:

> It is our conclusion, therefore, that the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto. A9.

Petitioner The Toledo Trust Company, as Trustee of Trust No. 4118 asserted its complaint of denial of due process by reason of the Ohio Supreme Court's judgment, upon motion for rehearing in that court. The motion was summarily denied.

Petitioners' federal claims were thus made at the earliest opportunity below, were renewed at each stage of appeal, and were finally decided by the Ohio Supreme Court.

STATEMENT OF THE CASE

In 1960 Nancy S. Jones as grantor established by agreement with The Toledo Trust Company, an Ohio banking corporation as trustee, an irrevocable trust, known as Trust No. 4117, for her daughter, Marcia Rivas, as income beneficiary. The trust agreement (A48, A49) provided that upon Marcia's death the principal was to be distributed as she might appoint by her will, among persons or entities belonging to specified classes of appointees, including charitable institutions. The trust agreement further provided that, to the extent Marcia failed effectively to exercise such special testamentary power of appointment, and in the event (as happened) that she left no surviving issue, the property would be distributed to another trust, known as Trust No. 4118, created by the same grantor, of which The Toledo Trust Company was also trustee. A50.

Marcia died in 1982, a resident of California. By her will (A67), probated in Santa Barbara County, California, she exercised her special testamentary power of appointment in favor of a number of charitable institutions, each for a designated share of the property. One such appointee, Alcoholics Anonymous of Santa Barbara, declined to accept so much of its appointed share as exceeded the sum of five hundred dollars. A74.

Upon learning of Alcoholics Anonymous's declination, respondent Santa Barbara Foundation, a charitable institution not named in the will, filed in the Superior Court of the State of California, County of Santa Barbara, where the will had been probated, a "Petition for Determination of Entitlement to Distribution of Estate" (A76), seeking to have itself substituted as appointee of the property by application of the doctrine of *cy pres*. The petition alleged that "various persons and organizations claim an

interest in the Estate of Decedent and in the property in trust subject to Decedent's power of appointment" and named, as among such persons or organizations, Toledo Trust Company at its "residence" and mailing address in Toledo, Ohio. A78-A79, A81.

A "Notice of Hearing" together with a copy of respondent Foundation's petition was then sent by certified mail addressed to "Toledo Trust Company, attn: Gerald W. Miller" (one of its trust officers). The notice was on a form which stated in part:

> "This notice is required by law. This notice does not require you to appear in court, but you may attend the hearing if you wish." A86-A87.

This notice was all that petitioners—The Toledo Trust Company as Trustee of Trust No. 4118 (the trust claiming the assets as taker in default of effective exercise of the power of appointment) and The Toledo Trust Company as Trustee of Trust No. 4117 (the trust holding the assets in question)—received prior to the California court's hearing on respondent's petition. The notice was issued pursuant to a California statute, Probate Code §1200.5 (A106), which provided for mailing that form of notice to parties interested in probate proceedings variously described as to subject matter. The statute does not reflect any criteria (e.g. of presence, residence or other contacts with the forum) for subjecting the parties so notified to any assertion of personal jurisdiction. No summons or other process pursuant to a "long arm" statute, or otherwise asserting any basis for compulsory appearance or threatening default for failure to appear, was issued or served.

After a hearing held on October 6, 1983 as stated in the Notice, at which only counsel for respondent Foundation appeared, the California court on October 13, 1983

entered an "Order Determining Entitlement to Distribution of Estate." A96. The "estate" was the *trust estate,* the above-mentioned share of the assets of Trust No. 4117, which the Court "hereby ordered distributed to Santa Barbara Foundation . . ." A97-A98.

Confronted with Trust No. 4118's adverse claim of entitlement to the assets, the Trustee of Trust No. 4117 then brought an action in the Court of Common Pleas of Lucas County, Ohio, the situs of the trust, naming both Trust No. 4118 and respondent Foundation as defendants, and seeking a determination of their respective claims, and instructions as to its duties in the premises. A35.

Taking as the "threshold issue" the question whether, under the terms of the trust agreement, the power of appointment was effectively exercised where the designated appointee had declined, the Court of Common Pleas held that it was unnecessary to pass on the question whether the California order was entitled to full faith and credit. A28. The Ohio Court of Appeals affirmed, substantially on the basis of the common pleas court's reasoning, and further by construing the trust agreement not to permit an exercise of the power to be made effective by resort to *cy pres* where the grantor had expressly provided for a gift in default of effective exercise. A13-A22.

The Ohio Supreme Court granted a motion to certify the record, and reversed. A1-A12. The sole basis for reversal was that the California court's order was entitled to full faith and credit, and was binding on petitioners. A9.

The Ohio Supreme Court denied a motion for rehearing on October 7, 1987. A54.

On remand, the Court of Common Pleas entered an order directing that the trust assets in question be distributed to respondent Foundation. A30-A31.

REASONS FOR GRANTING THE WRIT

I. The Ohio Supreme Court Effectively Ignored This Court's Ruling in Hanson v. Denckla

In *Hanson v. Denckla,* 357 U.S. 235 (1958) this Court held the Fourteenth Amendment's guarantee of due process to preclude enforcement of a Florida judgment, determining entitlement to property held and administered in Delaware as a trust asset, as against the Delaware trustee and non-resident trust beneficiary claimants who, though notified of the Florida proceeding, elected not to appear. The question presented was whether Florida's interest in the entitlement determination as a matter of its undoubted probate jurisdiction—over administration of an estate for which the property was claimed as an asset, or over a will claimed to have disposed of the property—was so compelling as to make *notice alone* adequate for affording due process to non-resident parties.

Answering that question in the negative, this Court proceeded in its opinion to test Florida's jurisdictional claims under the traditional heads of *in rem* and *in personam* jurisdictional analysis. The Court found that by neither such test did the exercise of Florida's jurisdiction in respect to determining interests and claims of non-resident, non-appearing parties, satisfy the Fourteenth Amendment's due process mandate.

In the instant case the Ohio Supreme Court cited *Hanson v. Denckla,* but in holding that the California probate judgment was conclusive, and that petitioners, the Ohio trustee and adverse beneficiary claimant, had in effect been defaulted by their having elected not to

appear before the California court, the Ohio Supreme Court selectively ignored what *Hanson v. Denckla* declared. Treating that decision as though it concerned only jurisdiction *in rem*, and noting that in the instant case no such jurisdiction had been claimed, the Ohio court by its majority opinion distinguished *Hanson v. Denckla* as irrelevant:

> "In *Hanson v. Denckla, supra,* the Supreme Court clearly stated the basis for its determination not to afford full faith and credit to a Florida decision affecting a Delaware trust: '* * * [s]o far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.' *Id.* at 250. The California judgment in the case at bar presumed to do no such thing." A8-A9.

Having thus treated this Court's principal exposition of constitutional limitations on jurisdiction over trust litigation in multi-state settings as though it dealt only with jurisdiction *in rem*, the Ohio Supreme Court avoided any inquiry as to whether, consistent with due process, there was any alternative basis for the California court's having jurisdiction over petitioners *in personam*.

II. The California Court Lacked Any Basis Consistent With Due Process for Jurisdiction Over Petitioners

The claim in *Hanson v. Denckla* for Florida jurisdiction *in personam* was characterized by this Court as the "stronger argument," 357 U.S. at 250. In the instant case that argument, were it open, would be considerably less forceful. Here the contestants over the property each claimed as trust beneficiaries—Santa Barbara Foundation

as taker by exercise of the testamentary power of appointment, Trust No. 4118 as taker in default of such exercise. No one claimed the property as belonging to the Estate of Marcia Rivas, donee of the power. Hence while the California court was apparently the court in which that estate was being administered, the question before it in this proceeding was extraneous to such administration. This was not a case where "[d]istribution of the assets of the estate could not be made without determining the validity of the power of appointment," *Hanson v. Denckla, supra* at 262 (Douglas, *J.*, dissenting), or indeed a case where *any* determination of entitlement pursuant to, or in default of, exercise of the power could have affected the property of the estate, the responsibilities of its executor, or the interest of any person claiming as an estate beneficiary or creditor. Here the California court's only subject matter connection with the donative arrangements on which it was asked to pronounce was that it was the court in which the Rivas will had been admitted to probate.

But even if it were assumed that the California court had *some* basis of subject matter jurisdiction to construe or reform the will in relation to the testatrix's attempted exercise of the power of appointment,[1] it is clear that mere notice of its proceeding was constitutionally insufficient to make that court's judgment binding on either of the petitioners, non-residents of California, who chose not to appear. While here, as in *Hanson v. Denckla, supra,*

> "There is no suggestion that the court failed to employ a means of notice reasonably calculated to

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1. But see, *Blount v. Walker,* 134 U.S. 607 (1890).

> inform non-resident defendants of the pending proceedings, or denied them an opportunity to be heard in defense of their interests. The alleged defect is the absence of those 'affiliating circumstances' without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or *quasi in rem*)." *Id.* at 245-6.

The Ohio Supreme Court did not find, nor does the record disclose, any such "affiliating circumstances."

Prior to the adoption of the Fourteenth Amendment it was "intimated, if not held" by some state courts that an effective personal judgment could be rendered against a non-resident party, who did not appear and submit to the rendering court's jurisdiction, upon notice to that party by publication or by extraterritorial service pursuant to a statute in the rendering state, *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917). But with the adoption of the Fourteenth Amendment, and ever since this Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878), the guarantee that "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ." has been recognized as a limitation on enforcement of judgments—whether by courts of the rendering state, e.g. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), or by courts of a sister state, e.g. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942)—against parties not present or residing in the rendering state, and who did not appear before its court.

The scope of this due process limitation has been redefined over time, to extend beyond criteria of presence or residence, e.g. *Milliken v. Meyer*, 311 U.S. 457 (1940), to "certain minimum contacts with [the forum] such that

the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Such "minimum contacts" have been found to consist in actions taken within the forum state, *Henry L. Doherty & Co. v. Goodman,* 294 U.S. 623 (1935), or "purposefully directed" there, *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984), or involving "deliberate affiliation" with its legal system, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 482 (1985).

Once such "minimum contacts" are established, consideration then turns to "other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'," *Burger King, supra* at 476, *Asahi Metal Industry Co. v. Superior Court of California, Solano County,* 480 U.S. ....., ..., 107 S. Ct. 1026, 1033-4, 94 L.Ed.2d 92, 105 (1987).

Among such "other factors" which this Court has recognized, two are especially meaningful here. One is the jurisdictional significance of a deliberately made choice of law, in weighing the reasonableness or fairness of subjecting a non-resident to personal jurisdiction in a particular forum, *Burger King, supra* at 481-2. That choice points away from California in the instant case, the grantor of Trust No. 4117 having expressly directed, in Article VII of the trust agreement, that "This agreement and all of the trust assets held in trust hereunder shall be subject to and held, administered and distributed in accordance with the laws of the State of Ohio." A65.

The other such especially significant factor is "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980).

These two factors are brought to focus in multi-state settings for trust litigation by the doctrine of *Hanson v. Denckla*. Absent some basis for personal jurisdiction over all necessary parties by their presence, residence or appearance in a forum, or by serving them with process pursuant to a "long arm" statute where some affiliation by "contacts" exists, e.g. *Miller v. Davis*, 507 F.2d 308 (6th Cir., 1974), the situs for such litigation is restricted to what commentators have called the place of "primary supervision"[2] of a trust, where, having jurisdiction over the trustee and *in rem* over the trust assets, a court can require the appearance of all interested parties and adjudicate their respective interests. That situs ordinarily reflects the grantor's choice of law and governance for the trust, a choice made impliedly by establishing the trust there, or as here by express provision in the trust agreement. And to the extent the doctrine of *Hanson v. Denckla* thus restricts the available forums for trust litigation in multi-state settings, it appropriately reduces the possibility of parallel proceedings being prosecuted simultaneously in courts of more than one state, with the outcome determined in whichever such proceeding comes first to judgment, see, e.g. *In re: Morgan Guaranty Trust Co.*, 28 N.Y.2d 155, 170, 269 N.E.2d 571, 580 (1971) (dissenting opinion of Breitel, J.). Reflecting on these considerations, Professor Scott wrote:

> "In policing the distribution of power among the states, [the U.S. Supreme Court] must take a position one way or the other. I think that it is fortunate that the Supreme Court held that it was Delaware and not Florida which had control over the disposition of the property, and held that, except so far as

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2. See, e.g. 5 Scott, *Trusts* §571 (3d ed., 1967).

the jurisdiction of the Florida court might be based on personal jurisdiction over some of the beneficiaries, it had no power to determine who should ultimately receive the property." Scott, *Hanson v. Denckla*, 72 Harv. L. Rev. 695, 708 (1959).

III. The Ohio Supreme Court's Ruling Has Widespread Application to, and Disruptive Effect on Trust Litigation

The Ohio Supreme Court's ruling in this case is more than an aberration. This Court must be concerned with its consequences, which implicate not only the interstate, but the federal judicial system.

Millions of Americans hold trust powers at least analogous to the one exemplified here. Apart from powers of appointment granted under private trusts are provisions of pension plans which authorize plan participants to direct distribution of plan assets during their lifetime, or succession following their death. With respect to pension plans incorporating such powers of direction, as well as with respect to private trusts incorporating powers of appointment, courts of the state where the holder of the power is or was domiciled may be called upon, in some cases to direct an exercise of the power (by a guardian, for example, where the holder is incompetent[3]), and in other cases to construe some act of exercise or determine its effect. Rulings on such matters will in many cases affect the interests of parties not residents of the power-holder's domicile, who claim trust property adversely to suitors petitioning the domiciliary court.

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3. See, e.g. *Toledo Trust Co. v. National Bank of Detroit*, 50 Ohio App. 2d 147, 362 N.E.2d 273 (Lucas Co. Ct. App., 1976).

If, by a failure to enforce adherence to jurisdictional due process limitations laid down by this Court in *Hanson v. Denckla,* the non-resident claimants were threatened with default upon failing to appear in the court of the power-holder's domicile, then it may be expected that they would so appear. But in many such cases the non-resident claimants, or some of them, may also be expected to initiate parallel proceedings for determination of the same matters in some other state forum where, as the situs of the trust, jurisdiction over all interested parties might be acquired *in rem,* or *quasi in rem, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), or where, if such parties can be served personally or appear voluntarily, jurisdiction might be acquired *in personam, Underwriters National Assurance Co. v. North Carolina Life Guaranty Ass'n.,* 455 U.S. 691, 711 (1982).

The prospect of simultaneous parallel proceedings in multiple state forums is disturbing from the standpoint of trust, as well as judicial administration. Confronted with that prospect, which extends not only to conflicting, or "first-to-judgment" rulings on the merits of a trust dispute, but to conflicting or uncertain state court jurisdictional assessments, trustees will be impelled to seek relief in the federal courts under the Interpleader Act, 28 U.S.C. §1335. As this Court has said:

> "The difficulties such a race to judgment [by claimants in multiple state forums] pose for the insurer, and the unfairness which may result to some claimants, were among the principal evils the interpleader device was intended to remedy. *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 533 (1967).

For "insurer," here read "trustee." And trustees would find themselves well advised to file such federal interpleader suits early, upon mere threat of multiple state court proceedings, given the concern that a state court proceeding in which jurisdiction *in rem* attaches may preclude subsequent initiation of federal interpleader, cf., *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456 (1939). But since, while the Interpleader Act provides for nationwide service of process, 28 U.S.C. §2361, it prescribes venue in the district where one or more of the claimants reside, 28 U.S.C. §1397, the interpleader situs may be foreign to the trustee or to the situs of trust administration.

The burden of "practical uncertainties" of state court jurisdictional limitations has already been cited by commentators to predict that "this area of interpleader may become an exception to the efforts to reduce federal court diversity jurisdiction," Scoles and Hay, *Conflict of Laws,* 255 (1984). That prediction would be fulfilled for trust litigation in multi-state settings, to whatever extent that litigation is afflicted by such uncertainties.

Thus, the ultimate consequence of a failure of what Professor Scott has described as this Court's Fourteenth Amendment "policing" of the distribution of judicial power among the states,[4] would be substitution of another regime of "policing" by federal courts, under the Interpleader Act.

We know of no reason why this should be thought desirable.

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4. *Supra* at 708.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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